

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff, No: 1:23mj230

vs.

ANDREW BLAIR HOWARD,

Defendant.

Before:

THE HONORABLE RAY KENT
U.S. Magistrate Judge
Grand Rapids, Michigan
Tuesday, June 25, 2025
Sentence Proceedings

APPEARANCES:

MR. MARK A. TOTTEN, U.S. ATTORNEY
By: MS. LAUREN BIKSACKY
MS. MEAGAN JOHNSON
330 Ionia Avenue, NW
Suite 501
Grand Rapids, MI 49503
(616) 456-2404

On behalf of the Plaintiff;

MR. ANTHONY J. VALENTINE
227 Federal Square Building
29 Pearl Street, NW
Grand Rapids, MI 49503
(616) 288-5410

On behalf of the Defendant.

Also Present: Scott Dekkers, NPS.

REPORTED BY: MR. PAUL G. BRANDELL, CSR-4552, RPR, CRR

1 06/25/2024

2 (Proceedings, 2:00 p.m.)

3 THE CLERK: United States District Court for the
4 Western District of Michigan is now in session. The Honorable
5 Ray Kent, United States Magistrate Judge, presiding. Please be
6 seated.

7 THE COURT: This is 23mj230, United States versus
8 Andrew Howard. Ms. Biksacky, Ms. Johnson on behalf of the
9 United States. Mr. Valentine on behalf of Mr. Howard. This is
10 the time and place set for sentencing in this matter.

11 Following a bench trial on February 7 I found
12 Mr. Howard guilty of one count of tampering and one count of
13 vandalism as charged in the Class B information. The maximum
14 sentence that I could impose upon conviction of those offenses
15 is imprisonment for not more than six months, a fine of not
16 more than \$5,000, probation of not more than five years, a
17 mandatory special assessment in the amount of \$10, restitution
18 and the cost of proceedings.

19 I did not order a presentence investigation or the
20 preparation of a presentence report in this matter.

21 The parties have filed voluminous documents directed
22 at sentencing, including the government's opening sentencing
23 memorandum, which is at ECF 20, Defendant's opening memorandum,
24 ECF 21, the Defendant's response to the government's opening,
25 ECF 22, the government's reply brief to that, ECF 24,

1 Defendant's surreply brief at ECF 25, and a notice of updated
2 restitution costs filed by the government at ECF 27. I have
3 read all of those documents and their attachments.

4 In order to perhaps not spend time unnecessarily, I
5 want the parties to know that I do not intend to rule on
6 whether the mandatory victim's restitution act applies. The
7 parties made reasoned arguments for and against application of
8 the act in their filings, but it's unnecessary for my decision.

9 All right. Who will be speaking on behalf of the
10 United States?

11 MS. BIKSACKY: Your Honor, I would briefly address the
12 nonmonetary penalties and then hand over the duration of the
13 argument, if the Court is amenable, to Ms. Johnson, who is in
14 charge of our financial litigation department at our office and
15 who will address the monetary issues.

16 THE COURT: That's fine.

17 MS. BIKSACKY: Because this was a bench trial, I am
18 fully aware that the Court was present for and fully understood
19 all of the evidence that came in at trial and so I won't
20 belabor much of the proofs as it relates to sentencing, but
21 instead, focus on what the government believes would be an
22 appropriate and adequate sentence based on the seriousness of
23 the conduct that the Court did hear the evidence for.

24 So in this case, although intent was not required to
25 be shown as an element of the offense, I think the evidence

1 more than adequately established that the Defendant intended to
2 take the actions he did and intended to alter the course of the
3 river, and we saw him do so with a shovel that he purposefully
4 bought for that purpose. We saw him do that over an extended
5 period of time both in moving the rocks, and in his words,
6 enhancing the original trench, and so the government believes
7 that this was not a mere accidental issue that could be written
8 off, but that some sort of, in this case, probationary
9 sentence, would be appropriate here.

10 The government is not --

11 MR. VALENTINE: Excuse me. I apologize. I did not
12 hear one word. Some sort of what?

13 MS. BIKSACKY: Some sort of probationary sentence.

14 MR. VALENTINE: Thank you.

15 MS. BIKSACKY: Some sort of probationary sentence
16 would be appropriate. In this case the government is not
17 seeking a period of detention. We would ask either for a
18 supervised or unsupervised probationary sentence at the Court's
19 discretion, and what the government is really interested in and
20 the National Park Service is really interested in, is a
21 potential ban. And I have consulted with AUSAs and law
22 enforcement officers from other national parks in the country,
23 including Yellow Stone National Park, and I learned from them
24 that one thing that they commonly ask for and that they
25 commonly receive in situations involving damage to our national

1 resources, is a ban for the period of probation, and I do not
2 anticipate any issues upholding that ban. And so we would ask
3 that whatever -- if, indeed, the Court does impose a
4 probationary sentence, it would include a ban for Mr. Howard
5 accessing or going upon National Park Service land, which would
6 include the Sleeping Bear Dunes National Lake Shore.

7 Now, I understand that sometimes boundaries are not
8 always clear. They may involve some highways or different
9 thoroughfares driving through a region, and that Mr. Howard
10 does have a vacation home up north by the Platte River, and so
11 the government's request -- and this is not meant to impose
12 anything unduly restrictive on his travel around the county or
13 things of that nature, but really aimed at curbing his conduct
14 and imposing a penalty for his conduct.

15 We know from the trial that he is an avid fisherman.
16 He referred to the Platte River as his home river. He
17 indicated he had a special parking permit or residence near the
18 river, and I have spoken with the National Park Service. They
19 have observed Mr. Howard fishing in the area already this year.
20 And so the government thinks that imposing a ban from
21 Mr. Howard accessing the National Park Service land at Sleeping
22 Bear Dunes would, in essence, show Mr. Howard that he can't
23 take the actions that he did and then expect to reap the
24 benefits of those ill-advised actions.

25 And so with the ban, Mr. Howard would then necessarily

1 need to travel north or south to access Lake Michigan for his
2 fishing. It wouldn't be the most direct route, because as the
3 Court heard, the most direct route is through that river where
4 the channel emerged. And this would provide some deterrence,
5 both for Mr. Howard and others, and make sure that Coho Andy is
6 not fishing for coho on National Park Service land that he
7 damaged.

8 And so with that, Your Honor, I would pass the
9 microphone to Ms. Johnson, unless the Court has any questions
10 regarding probation?

11 THE COURT: I don't. Thank you.

12 MS. BIKSACKY: Thank you.

13 MS. JOHNSON: Hello, Your Honor.

14 THE COURT: Hello.

15 MS. JOHNSON: We are here this afternoon -- and I know
16 Your Honor said that you did not intend to impose mandatory
17 restitution so I'll leave those arguments aside.

18 THE COURT: Thank you.

19 MS. JOHNSON: But we are here because Mr. Howard
20 committed an offense against the United States because he had a
21 policy dispute, and he took those matters into his own hands
22 and frankly cost a lot of financial damage to the park, to the
23 coast guard, and -- and to the government for those. And apart
24 from the mandatory restitution statute --

25 THE COURT: Yeah. The parties agree I can impose

1 restitution as a condition of probation.

2 MS. JOHNSON: Correct. So under 3563(b) the Court has
3 the discretion to impose restitution. That discretionary
4 imposition looks initially whether the Court should impose
5 restitution at all, and then once the Court decides to impose
6 restitution it should impose restitution for the full amount of
7 the victim's losses under 3664. So that's how that statutory
8 scheme goes.

9 We submitted costs for the National Park Service
10 restitution costs of \$12,868 that was caused when Defendant --
11 after the damage to the river caused significant ecological
12 harm to the wetlands, to the flow of the river. And the
13 National Park Service dispatched employees. It dispatched
14 hydrologists. It spent a lot of time and money trying to
15 figure out if any of those -- if any of the wildlife needed to
16 be rehabilitated, if the -- if the river needed to be
17 rehabilitated, and the cost to the wildlife if -- if the river
18 was rehabilitated.

19 And at the end of that investigation it was determined
20 that the cost to the wildlife, to the -- those endangered
21 species and plants would be too significant because of the
22 disruption -- additional disruption to the land, and so they
23 decided to leave the river be, but it doesn't mean that it
24 doesn't cost a significant amount of money and time and
25 resources that the United States Government would not have had

1 to spend had Mr. Howard not taken those actions into his own
2 hands, which is what he did here.

3 They had -- you know, the coast guard spent time and
4 money and fuel flying. That is a loss of property that was
5 spent that the government wouldn't have spent otherwise, the
6 resources. And the case law is clear that when a government is
7 spending money to fix harm that was foreseeably caused by his
8 conduct, that that harm can be compensated through restitution,
9 and the United States would ask that that harm be repaired
10 because I think that by not doing that, not just in
11 Mr. Howard's case, but for others who would want to take the
12 law into their own hands for policy disputes, they might
13 believe that the punishment of probation or a park ban is worth
14 the cost of their crime.

15 In addition, the statute 1865 has sort of a unique
16 provision for cost of proceedings that's not commonly incurred
17 in criminal statutes, but it says the Court shall impose those
18 costs, and we submitted costs from the travel expenses for the
19 rangers to travel to the trial and for the costs that the
20 government spent having witnesses come to this trial, and so
21 those are the costs of proceedings that the United States would
22 request that the cost impose.

23 In our notice -- updated notice we put a chart in
24 there that has the different expenses on the reasoning for
25 those with, you know, the payees for those expenses. And so

1 the United States would -- would ask that those costs be
2 imposed.

3 Before I conclude, are there any specific areas that
4 the Court would like me to address? Our briefing is voluminous
5 but if there is anything that the Court is particularly
6 concerned about I can address that.

7 THE COURT: I thought I understood you to say just now
8 that you were seeking restitution in the amount of \$12,000 and
9 some. I thought it was 22,000.

10 MS. JOHNSON: It's 12,000 for the National Park
11 Service, 9,000 for the costs that the Coast Guard incurred. So
12 it's \$22,472 total. I apologize if I omitted that.

13 Sure. So the National Park Service cost is \$12,868
14 that they incurred. The coast guard spent an additional
15 \$9,603.93 for a total restitution request of \$22,472.22. For
16 cost of proceedings we are requesting for the ranger travel
17 \$2,113.07, the trial travel expenses of --

18 THE COURT: You don't need to break it down
19 individually. That's okay.

20 MS. JOHNSON: Any further questions, Your Honor.

21 THE COURT: I don't. Thank you. Mr. Valentine.

22 MR. VALENTINE: Thank you, Your Honor. For the court
23 reporters benefit I can state the amount of restitution that I
24 think the Defendant is obligated to pay in this matter. I can
25 state it really clearly. It's zero, for the reasons that we

1 included in our briefs, and I am not sure where we stand on
2 that issue. Costs incidentally are a different issue and we
3 don't quarrel with the government's assessment or excuse me
4 their estimated -- their submissions regarding costs. I think
5 those are clearly recoverable. I think that as best I could
6 find, costs would be what they put in their memo.

7 But I do want to clarify one thing, and that is that
8 on the restitution issue it appears to me as though the Court
9 has, I am not sure, an idea as to where it's going with that or
10 does not.

11 THE COURT: Yes.

12 MR. VALENTINE: And thus doesn't need to hear any
13 further argument that was included in our submissions. By that
14 I mean all of the parties' submissions.

15 THE COURT: Correct. On the mandatory victim
16 restitution act issue. I made a decision not to go there.

17 MR. VALENTINE: Thank you, Your Honor.

18 Inasmuch as the government has set forth a condition
19 of probation that it wants the Court to impose, which was the
20 primary -- primary subject of their -- their comments, I want
21 to reply to that first.

22 And that is that I think -- and the Court is going to
23 hear from Mr. Howard on what he perceives to be the conduct for
24 which he accepts responsibility, which if this were a
25 sentencing under a different statute, we'd find ourselves

1 having the Court to address, but I do want to -- I do want to
2 remind the Court, I don't mean to say that in any sort of
3 aggressive manner, but some of the comments that the Court made
4 when it was rendering its decision regarding Mr. Howard's guilt
5 in this case were along the lines that he loves that -- he
6 loves that river. He cares about it. Lifelong time up there
7 on that river. In fact, yes, Mr. Howard has been up there
8 during the course of these proceedings which have gone on for
9 well over a year. There has been no incident as to his
10 behavior there other than the conduct in this case, and that --
11 that, Your Honor, would be a condition of probation that I
12 think would -- would -- would really -- would really hurt. Not
13 that probation isn't a matter of punishing, but when
14 Ms. Biksacky says that otherwise the Defendant benefits from
15 his actions in this case, Your Honor, any benefit you might
16 identify that Mr. Howard has received, and he's fished there
17 just like he has before, is far outweighed by what he's
18 experienced being a Defendant in a federal criminal case, going
19 to trial on it.

20 And you know, if you think about probation in this
21 case, Mr. Howard has been on a non-reporting at least
22 supervision by the probation office. I think Ms. -- I think
23 Christina Snow is his supervising officer.

24 THE DEFENDANT: Right.

25 MR. VALENTINE: And without incident met all of the

1 conditions of that probation. So just in terms of putting in
2 perspective this alleged benefit that he receives through his
3 actions in this case are -- I think they are more than -- more
4 than outweighed by the -- the negative and frankly disrupting
5 experience it's to be a defendant in this matter before Your
6 Honor. Not that he wasn't treated with respect and dignity as
7 are all Defendants before Your Honor, but at the same time I
8 don't perceive any benefit there.

9 As far as Mr. Howard goes and his respect, you know,
10 this week and-a-half before our sentencing here last week and a
11 little bit before that Mr. Howard was out west. What was he
12 doing? He was visiting national parks. I think he went to
13 three of them, one of them being Yellow Stone, and obviously no
14 incidents that I am aware of. I suspect you can inquire of
15 Mr. Howard whether or not there were, but he is somebody who
16 has an appreciation, who has a respect for our -- our -- our
17 national parks and for wildlife that are not -- that just don't
18 evaporate looking at -- you know, we just can't -- can't ignore
19 that and in an hour or so in the afternoon in August a couple
20 years ago as something that is -- is not who Mr. Howard is, and
21 it is not -- it's not -- isn't reflective of his -- of his
22 appreciation of the national parks.

23 I submitted a sentencing memo. I don't think there is
24 any genuine issue -- the initial sentence -- excuse me, the
25 initial sentencing memorandum that I submitted said I think

1 some very positive things about Mr. Howard. Talked a little
2 bit about his background, about his education, what he's done
3 with his life, and what he is -- his family situation. I am
4 not going to belabor that. His appreciation and respect for
5 the environment, his activities but also his -- also his
6 participation in organizations such as the Michigan Chapter of
7 the Ruffed Grouse Society.

8 He's done the very same things up there, Your Honor,
9 that you have done. He's kayaked that river. He has spent a
10 lot of time in that area and is somebody who I think his
11 actions over the course of his life indicate a respect and
12 appreciation for -- for the outdoors and for parks, the
13 national parks in particular, that don't require the Court take
14 any action to either disturb or to change in any way.

15 I think the Court has other sanctions. We expect a
16 fine will be imposed in this matter. We expect that there may
17 be other sanctions, but at the same time we would respectfully
18 request that that bar from the national parks for somebody like
19 Andy Howard not be imposed.

20 That's all I have. Thank you very much.

21 THE COURT: All right. Thank you, Mr. Valentine.

22 MR. VALENTINE: I mean, I am willing to answer, of
23 course, any questions you may have.

24 THE COURT: I actually have none, Mr. Valentine.

25 Thanks.

1 MR. VALENTINE: Thank you.

2 THE COURT: Mr. Howard, anything you'd like to say to
3 me before I impose sentence on you?

4 THE DEFENDANT: Yes.

5 THE COURT: All right. If you would, sir, come to the
6 podium.

7 MR. VALENTINE: May I stand next to Mr. Howard at the
8 lectern?

9 THE COURT: Of course. Absolutely.

10 MR. VALENTINE: Thank you.

11 THE DEFENDANT: There is even water handy.

12 First of all, I would like to thank you for the
13 opportunity to speak on my defense.

14 Your Honor, some of the comments you made in the court
15 transcription, page 158, line 1, Mr. Howard, your actions did,
16 in fact, damage the river. Remember the river was dredged in
17 that same location using massive equipment for 48 years. You
18 yourself enjoyed kayaking the Platte River and said you took
19 the long ride down the beach and enjoyed it.

20 On transcript page 153, line 7 through 11, you said, I
21 don't believe that the river could have been dredged by hand or
22 plastic shovels. A real shovel was involved. When my best
23 witnesses, Laura Collegia and Amy Roche, witnessed 15 teenagers
24 dredging the river with photographic and video evidence.

25 I was curious, do you believe I was involved in any

1 way in diverting the river prior to 5:30 p.m. on August 15th?

2 THE COURT: Mr. Howard, we are not -- I am not going
3 to get into a question and answer session with you. You are
4 happy to tell me whatever you want to tell me.

5 THE DEFENDANT: Okay.

6 THE COURT: And I will listen.

7 THE CLERK: I accept responsibility for any of my
8 actions in life but not for something I didn't do. My best
9 efforts could not have stopped the new diversion of the river
10 when I arrived. If my intent was to force the flow of the
11 river back to the old river bed with my shovel and moving
12 rocks, I could not have reversed the 20-foot wide raging
13 current that I -- that was occurring when I came down.

14 I wanted to run through to just really confirm the
15 timeline of what occurred from our photo evidence in the court
16 case. On Exhibit M that we presented on 2:27 p.m., we have the
17 water just beginning to flow through the original trench that
18 was dug.

19 On Exhibit L at 2:51 p.m., we have rock wing dams,
20 huge rock wing dams, and you can see in the background the
21 girl inner tubing down the new trench the river approximately
22 six to eight feet wide.

23 On Exhibit P at 3:08 p.m., we have multiple children,
24 teenagers, digging with their hands just as witnesses
25 testified, working on the new diversion of the river. And note

1 the width of the flow and the power of the current in such a
2 short timeline from 2:27 to 3:08.

3 Exhibit G, 4:03 p.m., the diverted river with kids
4 digging as witnessed by Laura and Amy, again, with the rock
5 damns. And Laura and Amy are even in the picture. Laura was
6 with her daughter and friend from 9:00 a.m. throughout the
7 entire day.

8 Exhibit N is 4:11 p.m. Again, I wanted to note the
9 width and the amount of current.

10 And then Exhibit S -- pardon me, Exhibit O, is a kind
11 of another picture of the newly diverted river with the level
12 of current. All of this occurring before any witness said that
13 I was even present.

14 And there even was I felt a misunderstanding in the
15 case of the Frankfurt hardware receipt at 4:23 p.m., which I
16 produced under the direction of my attorney, of an alibi of
17 where I was at when I left the river at noon to clean my fish,
18 and 4:23 with the drive time from Frankfurt back to the river
19 would put me back there at around the 5:30 timeline, which was
20 what was confirmed by several witnesses.

21 Not one witness said I was present during the initial
22 diversion of the river. Rock wing damns were already present
23 before Andrew Howard arrived. My actions after 5:30 p.m. were
24 of no significance to the river outcome. I should not be
25 paying for helicopter photos or environmental studies or be

1 banned from the park for something I didn't do.

2 From the court transcript governor witness Officer
3 Balm. Witness seen me digging at 6:20 p.m.

4 THE COURT: All right, Mr. Howard, these arguments I
5 am sure will all be made to the Sixth Circuit Court of Appeals
6 in Cincinnati and you are welcome to do that. We are not going
7 to rehash the whole trial here --

8 THE DEFENDANT: Okay.

9 THE COURT: -- and argue about your conviction. If
10 there is anything you wish to say to me on the issue of your
11 sentencing, happy to listen. Otherwise, we are going to move
12 on.

13 THE DEFENDANT: Okay. I'd like to give one example of
14 what I felt would be a comparative act, example to my actions.
15 I think it could be compared to someone saying they are going
16 to buy a knife and kill someone and leave the location and buy
17 a knife and come back five hours later to find the person I was
18 going to kill laying on the ground stabbed to death. Then law
19 enforcement arrives and sees me standing over the dead body
20 with a knife accusing me of the murder, when the man I came
21 upon was already dead. My actions were of no consequence and
22 would not have changed the outcome.

23 So my request to you in sentencing would be to listen
24 to my perspective of the amount of damage or involvement that I
25 had. My statements of what I was going to do looked terrible.

1 My being down there with a shovel was terrible. And I read
2 your comments in the transcript through three times, and I felt
3 I was pretty impressed actually with the balanced thoughts that
4 you had on both sides of the issue, but I felt that the level
5 of penalty -- even though, yes, I was digging in the new
6 trench, I think the level of penalty that the government is
7 seeking is too heavy for the amount of damage that occurred
8 from my arrival.

9 If I thought I was committing a crime, I wouldn't have
10 been there in broad daylight standing out there. Some of the
11 witnesses said I was very relaxed, and I felt that in the
12 transcript that there -- that you may have misinterpreted me
13 saying I really dodged a ticket. My comment to the witness
14 that I really dodged a ticket, it was Kurt Walbey, wasn't that
15 I got away with a crime. It was that I was fortunate. I was
16 actually thanking God that I came down after someone else
17 diverted the river and it was opened up. Because my intentions
18 were bad. But I didn't feel that I dodged a ticket because I
19 knew I was down there committing a crime. If I thought I was
20 committing a crime and the river was already opened up I would
21 have put that shovel over my shoulder and been running back to
22 the car.

23 THE COURT: Mr. Howard, I am not sure you are helping
24 yourself on appeal with your comments now, so I would just
25 suggest if there is other things you want to say maybe run them

1 past Mr. Valentine --

2 THE DEFENDANT: Okay.

3 THE COURT: -- first and I am happy to listen.

4 Otherwise, time to move on.

5 THE DEFENDANT: Okay.

6 THE COURT: I don't want you to harm your case moving
7 forward, and I am not sure -- I am concerned that you may be
8 doing that in some way, so you may be seated.

9 THE DEFENDANT: Okay.

10 THE COURT: Ms. Biksacky, I neglected to ask whether
11 there were any victims present who want to speak?

12 MS. BIKSACKY: We do have representatives from the
13 National Park Service present, Your Honor. However, they will
14 not be giving any victim statement.

15 THE COURT: Okay. Thank you.

16 It's my duty to impose a sentence sufficient but
17 not --

18 MS. BIKSACKY: Your Honor, I apologize.

19 THE COURT: Yes.

20 MS. BIKSACKY: Ms. Johnson has instructed me that
21 there is one procedural aspect that she would like to address
22 before the Court issues its ruling.

23 THE COURT: Okay.

24 MS. JOHNSON: Yes, Your Honor. I just wanted to note,
25 because if you impose restitution it would be under a term of

1 probation, and so the payment term, if you impose restitution,
2 needs to be over the term of probation because restitution
3 wouldn't exist beyond probation. So if you impose restitution
4 make sure the payment schedule it is over -- its long enough
5 that it covers the whole term of the payment schedule. The
6 probationary term.

7 THE COURT: Well, I am not sure that's possible and
8 yet reasonable. I mean, the government -- if I put Mr. Howard
9 on probation, and order him to pay restitution -- I mean, when
10 his term of -- you are saying when his term of probation
11 expires it extinguishes his obligation to pay the rest of the
12 restitution? Is that what you're saying?

13 MS. JOHNSON: That's correct, Your Honor. If you
14 impose it under that statute it's only for the term of
15 probation, and so you could have unsupervised probation, it
16 just needs to be -- if you are imposing restitution as a term
17 of that probation, it needs to be concurrent with that term.
18 You can impose it due and payable immediately, and then, you
19 know, we could establish something separate, but you're -- it's
20 only due during his probationary period.

21 THE COURT: By something separate you mean you could,
22 through Mr. Howard's counsel, work out some kind of payment
23 schedule? Is that what you are saying.

24 MS. JOHNSON: Sure. Yeah. I mean, that's possible as
25 well, but I just wanted you to know that the payment term is --

1 the funds are only due during a term of probation.

2 THE COURT: Well, I appreciate you telling me that
3 because I didn't know that.

4 Mr. Valentine, any thoughts on that subject?

5 MR. VALENTINE: Well, Your Honor, as we indicated in
6 our memo, we don't think restitution is appropriate under the
7 Mandatory Victim's Restitution Act.

8 THE COURT: Right, and I agree with you on that.

9 MR. VALENTINE: Or the --

10 THE COURT: Well, I don't agree with you. I am not
11 ruling on the MVRA.

12 MR. VALENTINE: Got you. I mean, yes, Your Honor.
13 The second thing is that we don't think restitution is
14 appropriate under the probation statute that the government has
15 indicated it wants probation to be imposed under either for the
16 reasons that we indicated in our submission. Thank you.

17 THE COURT: Understood. Okay.

18 Well, Ms. Johnson, you have thrown a monkey wrench
19 into my work, so it's better to figure it out now then have to
20 deal with it later. All right. We are going to take a short
21 pause. Can I see Officer Jabour in chambers, and we'll come
22 back out here in the very near future.

23 THE CLERK: All rise, please. Court is in recess.

24 (Recess taken, 2:32 p.m.)

25 (Resume Proceeding, 2:41 p.m.)

1 THE CLERK: Court is back in session. Please be
2 seated.

3 THE COURT: All right. We're back on the record. I
4 think I have a way to impose the sentence I intended to impose
5 by adjusting some of the terms.

6 So back to where I was. It's my duty to impose a
7 sentence sufficient but not greater than necessary to comply
8 with the purposes of sentencing set forth in 18 United States
9 Code § 3553(a). I have considered all non-frivolous arguments
10 in support of a request for a lower sentence. I have
11 considered the 3553 factors, including the nature and
12 circumstances of this offense, the history and characteristics
13 of the Defendant. Mr. Howard has never been convicted of a
14 crime as far as I know. To reflect the seriousness of the
15 offense, promote respect for law, provide just punishment,
16 afford adequate deterrence to Mr. Howard and others, and the
17 kinds of sentences available.

18 The Platte River was carved out between 10 and 20
19 thousand years ago by the Lake Michigan lobe of the great
20 continental glacier that covered much of North America. It's
21 30 miles long. It's powerful. It dumps about 3.3 million
22 gallons of water per hour into Lake Michigan. The fact that
23 the course of this beautiful and ancient river could be altered
24 with a common garden shovel is a stark illustration of how
25 fragile the natural world can be and underscores how important

1 the mission of the National Park Service to protect and
2 preserve our natural spaces for the benefits of all Americans
3 really is.

4 Mr. Howard, I am placing you on probation for a term
5 of 60 months. While on probation you will be subject to
6 mandatory conditions of probation, which include that you not
7 commit a crime, which I have no expectation that you will. You
8 can't unlawfully use or possess any controlled substance,
9 including marijuana. I don't know if you do or not but you
10 can't. And there are other conditions that Officer Jabour --
11 who will be your probation officer is here in court. When we
12 are finished you will go down to the first floor and meet with
13 him. He'll get you set up on probation, and he'll go over the
14 other mandatory conditions.

15 There are standard conditions. You report to him as
16 directed. You are truthful -- you truthfully answer questions
17 put to you by him. You are not to communicate or interact with
18 someone you know is engaged in criminal activity. I -- I don't
19 expect that of you. And there are a lot of other conditions.
20 Again, Officer Jabour will go over those with you.

21 I am also imposing additional special conditions and
22 those include a ban from entering onto National Park Service
23 property anywhere in the United States. So actually, I was
24 glad to hear that you have been to Yellow Stone. There are
25 more than 400 such properties I believe around the United

1 States. It's going to be incumbent upon you wherever you are
2 to know the boundaries and to stay off of those properties.

3 The parties agree that I can impose restitution as a
4 condition of probation. Mr. Valentine has made arguments in
5 his extensive briefings about foreseeability and causation,
6 that I make those part of my analysis, and foreseeability of
7 the damage. And there is no question that you foresaw the
8 damage because you told the officer you came down there
9 intending to cut open that channel. So not only could you
10 foresee it, but you intended it. And the evidence was clear
11 that you aided in the causation of that. You were seen digging
12 in the trench. You were seen moving rocks onto the wing dams
13 to help channel the water out through that cut through the
14 sand.

15 Mr. Valentine also argued eloquently that there was no
16 remediation here. In other words, ultimately the park service
17 decided not to attempt to restore that section of lake shore
18 back to its original condition, and the government, I think,
19 phrased that as the windfall argument. I am not going to call
20 it that, but I will say this. The park service did a study.
21 That's exactly what anyone should expect to happen under those
22 circumstances. The damage has been done. The first thing you
23 do is assess the damage and figure out what to do about it.
24 What can be done about it? And ultimately the park service
25 decided that attempting to put the river back in its original

1 course would require heavy equipment and that the risk that
2 that process posed to the environment would only have
3 exacerbated and multiplied the damage done by opening the
4 original trench, and so it elected not to do that. And I'll
5 say this, Mr. Howard, I think if they had decided to do it,
6 we'd be talking about a restitution number probably in the
7 hundreds of thousands of dollars.

8 I know you are upset because you feel like you are
9 getting tagged for the whole amount of restitution, and you
10 are. Federal law provides for that. There are cases cited by
11 the government in its brief. I am sure that Mr. Valentine has
12 looked at those cases. I would just say including U.S. v
13 Church. What do I have here? 731 F3 530. And also an
14 unpublished case U.S. v Buchanan, 2023 Westlaw 5352223, which
15 address these issues. And you know, it's simply the fact that
16 at times crimes are committed, damage is done, not all the
17 perpetrators are caught, but those that are caught are held
18 responsible for the entire amount of the damage because the
19 law -- we as a society through the law say it shouldn't be the
20 victim who bears the cost. If there is an inordinate cost to
21 be born here, and we have only got one of the three people who
22 did the crime, that person should bear the cost. That's a
23 decision that's been made in the law for a long time. And
24 although I understand your feelings, they are unfounded.

25 So I am going to order -- include as a special

1 condition that you also pay restitution in the amount of
2 \$22,472.22 payable in equal monthly installments of \$500 per
3 month beginning 30 days from the entry of this judgment.

4 Also, I am ordering you to pay the costs of
5 proceedings in the amount of \$3,947.71 to be paid in full
6 within 30 days from the entry of judgment, and a mandatory
7 special assessment of \$10.

8 Now, Mr. Howard, this is not exactly the sentence I
9 intended to impose, but I want to make sure the restitution is
10 paid. So if the restitution is paid in full on or before the
11 end of the 24th month of your probation, which begins at the
12 entry of judgment, I will consider an early termination of your
13 probation, and if you have also been in compliance with the
14 other conditions, so you have stayed out of the national park
15 lands and haven't run afoul of any of the other conditions, and
16 you have paid the restitution, I'll consider terminating your
17 probation at the end of 24 months as opposed to 60.

18 Any objections to the sentence imposed not previously
19 raised, Ms. Biksacky?

20 MS. JOHNSON: Your Honor, the United States would just
21 reserve its arguments with respect to mandatory restitution.

22 THE COURT: Sure.

23 Mr. Valentine?

24 MR. VALENTINE: I am confused. I am not sure what --
25 what that means.

1 THE COURT: I'll tell you what I think it means, which
2 maybe isn't determinative here, but what I think it means is
3 the United States is reserving its right to appeal my decision
4 not to impose restitution under the MVRA.

5 MR. VALENTINE: All right.

6 THE COURT: Am I correct?

7 MS. JOHNSON: Yes.

8 THE COURT: Okay.

9 MR. VALENTINE: All right. Well, that's fine, and I
10 understand it now, too.

11 The other thing, though, Your Honor, is that I think
12 you may have indicated that the parties agree on restitution
13 under the probation statute.

14 THE COURT: Well, the parties agree that I can impose
15 restitution. I didn't mean to suggest you agreed on the
16 amount.

17 MR. VALENTINE: We don't agree that you can impose
18 restitution under that statute, and I can --

19 THE COURT: Well, in your filing, Mr. Valentine,
20 surreply to government's reply brief ECF 25, at page ID 480,
21 "The government replies by stating that restitution can be
22 ordered under a different sentencing statute. The Defendant
23 agrees that restitution under that statute will be in the
24 Court's discretion." The footnote.

25 MR. VALENTINE: Okay. Well then --

1 THE COURT: And you can change your position. I was
2 just relying on the position stated in your brief.

3 MR. VALENTINE: And -- and our position would be that
4 the Court would be abusing its discretion under that statute
5 and that it wasn't appropriate, and I'll read what I stated in
6 that memo as well as the prior memo --

7 THE COURT: Absolutely fair.

8 MR. VALENTINE: -- and felt that that was something we
9 objected to.

10 THE COURT: Okay.

11 MR. VALENTINE: And therefore, I guess I need to say,
12 and as much as this is a sentence under the sentence reform
13 act, that whether or not it is, that we object to the Court's
14 disposition of the issues they raised that were decided against
15 us. Thank you.

16 THE COURT: All right. Thank you, Mr. Valentine.

17 All right. Anything else -- Mr. Howard, I am
18 obligated to notify you of your right to appeal both your
19 conviction and sentence. You have the right to appeal your
20 conviction and the right to appeal a sentence you believe was
21 illegally or incorrectly imposed. If you cannot afford to pay
22 the costs of an appeal, you have the right to apply for leave
23 to appeal in forma pauperis and the clerk of the Court will
24 prepare and file a notice of appeal upon your request. Any
25 notice of appeal must be filed within 14 days of entry of this

1 judgment, which is likely to happen in the next day or so.

2 Ms. Biksacky, anything else?

3 MS. BIKSACKY: Nothing further from the government.

4 Thank you.

5 THE COURT: Mr. Valentine?

6 MR. VALENTINE: Nothing, Your Honor. Thank you.

7 THE COURT: All right. Mr. Howard, I hope to see you
8 in 24 months and to be terminating your successful term of
9 probation.

10 MR. VALENTINE: May I be heard on one thing, Your
11 Honor, and that is that we did raise in our reply brief the
12 issue under whether -- under the probation statute that the
13 Court is referring to in imposing restitution that the same
14 issues of but for, directly and proximately caused and
15 reasonably foreseeable were issues that the Court could not
16 conclude existed --

17 THE COURT: Yes. You did. And I thought I had
18 addressed those in my remarks.

19 MR. VALENTINE: You have ruled on it. I just didn't
20 want the record to reflect that somehow we thought that, well,
21 accept for the amount --

22 THE COURT: Okay.

23 MR. VALENTINE: Except for the amount, that the -- the
24 only thing under the probation statute restitution would be the
25 amount, but no, no, no, we believe that it was inappropriate

1 for causation reasons as well for the Court -- inappropriate
2 for the Court -- pursuant to causation reasons, for the Court
3 to order restitution under that statute. Thank you.

4 THE COURT: You are welcome. All right. We'll be
5 adjourned.

6 THE CLERK: All rise, please.

7 (Proceeding concluded, 2:55 p.m.)
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REPORTER'S CERTIFICATE

I, Paul G. Brandell, Official Court Reporter for the United States District Court for the Western District of Michigan, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing is a full, true and correct transcript of the proceedings had in the within entitled and numbered cause on the date hereinbefore set forth; and I do further certify that the foregoing transcript has been prepared by me or under my direction.

/s/ Paul G. Brandell

Paul G. Brandell, CSR-4552, RPR, CRR

U.S. District Court Reporter

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